*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| *ROBERT V. PLISKIN, et al.,* | ) | |
| | ) | |
| *Plaintiffs* | ) | |
| | ) | |
| *v.* | ) | *Civil No. 90-0005 P* |
| | ) | |
| *RALPH BRUNO, et al.,* | ) | |
| | ) | |
| *Defendants* | ) | |

*RECOMMENDED DECISION ON MOTION OF DEFENDANTS KEARNS AND WATERMAN FOR SUMMARY JUDGMENT*

This action arises out of the January 1988 purchase by the plaintiffs for investment purposes of a condominium unit at The Shawmut Inn in Kennebunkport, Maine. The deal having soured, the plaintiffs have brought suit against several parties including their original sellers, Mark A. Kearns and James D. Waterman, asserting federal and state securities law, RICO, fraud and negligence claims. The matter is now before the court on the motion of defendants Kearns and Waterman for summary judgment on all counts.

Pursuant to Fed. R. Civ. P. 56(c), the court shall render summary judgment if there remains ``no genuine issue as to any material fact" and if ``the moving party is entitled to a judgment as a matter of law." The moving parties assert that a certain release signed by the plaintiffs operates as a bar to this action as against them. The plaintiffs contend that, for any number of reasons, the release is ineffectual.

The undisputed material facts may be briefly summarized. At the time the plaintiffs bought the condominium unit in question they also entered into two other separate agreements. One was a lease agreement with a Kearns and Waterman affiliate, Atlantic Hospitality, Inc., by the terms of which the

affiliate agreed to rent the unit from the plaintiffs for a monthly rental which equalled the plaintiffs' mortgage payment. The other was a buy-back agreement which obligated Kearns and Waterman to repurchase the unit in January 1990 for a stated price. Lease payments were made from February 1988 through October 1988 but ceased thereafter due to a cash-flow shortage. In early 1989 Kearns and Waterman advised the plaintiffs that they might bring in a financial partner to alleviate the cash-flow problem. In March 1989 they informed the plaintiffs that they had a buyer for The Shawmut Inn, one Ralph Bruno, and that, upon the closing, the plaintiffs would receive all past due rental payments in exchange for extensions to May 1, 1991 of the lease term and repurchase closing date and the execution of a general release. The plaintiffs were provided with an agreement to sign which reflected the foregoing. The agreement, which named as the parties thereto the plaintiffs as Owner, defendants Waterman and Kearns, Atlantic Hospitality, Inc. and Bruno, also recited in a preamble paragraph that the parties entered into the agreement ``for consideration paid and in consideration of all the terms and conditions herein." The agreement also contained the following section:

> III ACKNOWLEDGEMENT, CONSENT TO ASSIGNMENT OF LEASE AND BUYBACK AND GENERAL RELEASE:
>
> The Owner hereby acknowledges and consents to the assignment by Waterman and Kearns of all rights and obligations of the extended Lease and amended Buyback to Bruno. Bruno accepts the assignment of all such rights and obligations and agrees to be bound by all the terms and conditions of the Lease as extended and the Buyback as extended and amended.
>
> The Owner hereby forever releases Waterman and Kearns, (individually and as a partnership), Atlantic Hospitality, Inc., Ocean Realty, Inc. and also all affiliates and employees of same and their successors, heirs and assigns, of and from all claims of any kind and any and all causes of action of any kind or type, whether at common law or pursurant (sic) to federal, state or local statutes, whether said matters released herein are known or disclosed. This release is limited to matters which in any way arise out of, or are connected with, or related to the purchase of the Unit, the Lease and Buyback of the Unit

> and including all aspects of the transaction relating in any way to the Unit. Specifically excepted from this release is the obligation of Waterman and Kearns to pay all past due lease payments and 1988 real estate taxes owed by Waterman and Kearns related to the Unit.

The agreement was signed by all parties except Bruno. Despite this, the plaintiffs have alleged in their amended complaint that:

> On or about June 15, 1989, Port Resort Realty (as controlled by Bruno) acquired the Shawmut Inn from Kearns and Waterman and Bruno and Port Resort assumed any and all of the obligations and liabilities of Kearns and Waterman to the plaintiffs, including but not limited to those obligations pursuant to [the lease and buy-back agreements], which agreements Port Resort and Bruno have now breached.

Amended Complaint & 18.

A threshold issue is whether plaintiffs are estopped from asserting a failure of consideration based on Bruno's nonjoinder because of the allegations contained in & 18 of their amended complaint despite the apparent failure of Bruno to have executed the agreement containing the assumption of obligations and release language and the absence on the present record of any other evidence indicating that Bruno nevertheless assumed the obligations of Waterman and Kearns to the plaintiffs under the amended lease and buy-back agreements. I conclude for the following reasons that they are not.

While it is true that factual assertions in a party's pleading may be conclusively binding on that party, *see White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983), the court has broad discretion over whether such alleged admissions should be given binding effect, *see United States v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975); 9 *Wigmore on Evidence* & 2590 (1981). In *Belculfine* the Court of Appeals for the First Circuit explained:

> Unlike ordinary admissions, which are admissible but can be rebutted by other evidence, judicial admissions are conclusive on the party

> making them. Because of their binding consequences, judicial admissions generally arise only from deliberate voluntary waivers that expressly concede for the purposes of trial the truth of an alleged fact. Although there is a limited class of situations where, because of the highly formalized nature of the context in which the statement is made, a judicial admission can arise from an ``involuntary'' act of a party, considerations of fairness dictate that this class of ``involuntary'' admissions be narrow. Similarly, considerations of fairness and the policy of encouraging judicial admissions require that trial judges be given broad discretion to relieve parties from the consequences of judicial admissions in appropriate cases.

*Id.* (citations omitted). Here the statements contained in & 18 of the complaint which Kearns and Waterman contend are binding judicial admissions did not arise from either a voluntary waiver that expressly conceded facts for trial nor from a highly formalized context. Rather, they are statements contained in a generalized and broad complaint which appear to claim, however unartfully, that an entity controlled by Bruno was the successor in interest to Kearns and Waterman. To give these statements the preclusive effect for which Kearns and Waterman argue would be manifestly unfair.

The Federal Rules of Civil Procedure require that ``[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f). This means that the court does not ``require technical exactness or draw refined inferences against the pleader[s]; rather [it] make[s] a determined effort to understand what [they are] attempting to set forth and to construe the pleading in [their] favor, whenever justice so requires." 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1286 at 381-82 (1969). Read in the light most favorable to the plaintiffs, & 18 of the complaint simply states the plaintiffs' contention that Bruno, as well as Kearns and Waterman, is part of this allegedly fraudulent transaction. The plaintiffs' claims against Bruno, Kearns and Waterman are predicated on the theory that either Bruno or Kearns and Waterman are liable to them. Basing the dismissal of Kearns and Waterman on this alleged admission would have the untoward result of not permitting the plaintiffs a determination on the merits of who, if any, among these three defendants is responsible for their

injuries. If at a later stage in the proceedings it is determined through competent evidence that Bruno did indeed assume all of the obligations of Kearns and Waterman to the plaintiffs, Kearns and Waterman will then have every opportunity to assert the preclusive effect of the alleged release on the plaintiffs' claims against them. At this stage, in the interest of fairness, I conclude that the court in the exercise of its discretion should not treat the statements in & 18 of the complaint concerning Bruno as binding on the plaintiffs.

Because I conclude that these statements should not be considered judicial admissions, I also conclude that Kearns and Waterman have failed to sustain their burden of establishing that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence on this record clearly establishes that there is a genuine issue as to whether the release signed by the plaintiffs and Kearns and Waterman was meant to be binding absent Bruno's signature. Accordingly, I recommend that Kearns' and Waterman's motion for summary judgment be ***DENIED***.

***NOTICE***

***A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 13th day of July, 1990.***

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*David M. Cohen*
*United States Magistrate*